

11-5-2013

State v. Nicolescu Respondent's Brief Dckt. 40985

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 40985
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-MD-2011-17076
)	
KEVIN MICHAEL NICOLESCU,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE JOHN HAWLEY, Magistrate Judge
HONORABLE MICHAEL R. MCLAUGHLIN, District Judge

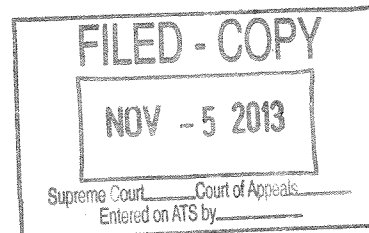
LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

RUSSELL J. SPENCER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

ED GUERRICABEITIA
Davison, Copple, Copple & Copple,
LLP
PO Box 1583
Boise, ID 83701
(208) 342-3658



ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Nicolescu appeals from the district court's appellate decision reversing the magistrate court's order to suppress evidence and remanding the case for further proceedings.

Statement Of The Facts And Course Of The Proceedings

The district court adopted the following findings from the magistrate court as the undisputed facts of this case:

On October 15, 2011 Defendant, Kevin M. Nicolescu (Nicolescu) was involved in a two vehicle collision at the intersection of Idaho and 16th streets in Boise, Idaho. Boise City Police Officer Ransom responded to the scene. Officer Chris Palic of the Boise City Police Department then arrived on the scene and was directed to speak with Nicolescu.

Nicolescu informed Officer Palic that he had proceeded through a green light west bound on Idaho Street when the other vehicle northbound on 16th Street apparently ran a red light and collided with his vehicle. While speaking with Nicolescu, Officer Palic detected a strong odor of an alcoholic beverage. In addition, Officer Palic noted that Nicolescu had red, bloodshot and watery eyes. There was no indication of slurred speech or impaired memory. There were some minor cuts and abrasions to Nicolescu's face, which Palic assumed were caused by the deployment of the airbag during the collision. Nicolescu agreed to speak with Palic.

Nicolescu admitted that he had consumed alcohol earlier that evening. Officer Palic requested Nicolescu submit to a Horizontal Gaze Nystagmus (HGN) test. After starting the HGN test, Officer Palic had scored Nicolescu with 4 of 6 decision points, but did not complete the test due to an injury to Nicolescu's left eye which had occurred as a result of the accident. Nicolescu then indicated that his adrenaline was kicking in and Officer Palic observed Nicolescu's legs shaking and that he was unsteady on his feet.

Palic discussed his observations with Officer Larry Moore, who was also on the scene. Palic explained to Moore that he had observed a strong odor of alcohol, glassy and bloodshot eyes, that Nicolescu had scored 4 of 6 decision points on the HGN (which would have been a failure) prior to terminating the test and that Nicolescu admitted he had consumed alcohol earlier that evening. The watery bloodshot eyes could have been caused by debris from the airbag deploying in the accident and it is also possible they resulted from Nicolescu consuming alcohol or even a combination of both factors. Palic explained that he did not want to perform other FSTs because Nicolescu was visibly shaken by the accident.

Palic was not aware of any traffic infractions or driving pattern because his only contact with Nicolescu was after the accident. Palic testified that he felt that he had enough information to arrest Nicolescu for suspicion of DUI. Palic testified that based on the totality of the circumstances he told Officer Moore that he felt Nicolescu was not safe to operate a motor vehicle. Officer Moore, who had witnessed the discussion between Palic and Nicolescu, agreed that Palic should continue his investigation to determine if Nicolescu was safe to operate a motor vehicle or whether he might be under the influence of alcohol. Paramedics on the scene examined Nicolescu and noted that he had a scratched cornea[.]

Thereafter, Officer Palic told Nicolescu that he was not going to continue the HGN test because of the eye injury and because Nicolescu was shaken up.

Palic then stated: 'What I am going to have you do is blow into a device (Alcosensor) and we'll just go from there. O.K. and we'll go from there. I will make my determination from there.'

Nicolescu replied: 'Dude, I'm willing to cooperate however.'

Palic stated: 'It will be a lot easier to do it this way, O.K.'

There was no audible response by Nicolescu and Palic then continued by explaining that Nicolescu would need to make a tight seal around the pipe and blow real hard.

Nicolescu submitted to the preliminary breath test [PBT] on the Alco-Sensor, which is a handheld breath alcohol tester. The Alco-Sensor is not

certified and is not performance verified. It is used to detect the presence of alcohol in individuals. The result of the preliminary Alco-Sensor test was .108 which is over the legal limit. Officer Palic then handcuffed Nicolescu and placed him in Palic's patrol vehicle to provide further breath samples. After a 15 minute wait period and an ALS [administrative license suspension] advisory, using the Lifeloc instrument ... Nicolescu provided further samples which registered results of .103 and .096. Nicolescu was then cited—not arrested—for Driving Under the Influence of Alcohol, a misdemeanor violation of Idaho Code § 18-8004. Nicolescu was not transported to the Ada County Jail to be booked for the DUI, rather he was transported to St. Alphonsus Regional Medical Center for treatment of the eye injury. Memorandum Decision & Order, at 1-4.

(R., pp.162-65 (footnote omitted).)

Nicolescu moved to suppress the breath test evidence arguing that officers lacked "the necessary probable cause or reasonable suspicion" to require Nicolescu to submit to evidentiary testing "absent the result of the preliminary breath test," and that police were not permitted to require Nicolescu to submit to a preliminary breath test. (R., pp.38-48.) The magistrate court granted Nicolescu's motion (R., pp.73-82), and the state appealed (R., pp.86-87). Finding that Officer Palic had reasonable suspicion to conduct a preliminary breath test in conjunction with other field sobriety tests, the district court reversed the magistrate's order and remanded the case for further proceedings. (R., pp.162-74.) Nicolescu filed a timely notice of appeal. (R., pp.176-78.)

ISSUE

Nicolescu states the issues on appeal as:

- A. Whether the District Court erred in finding as a Matter of Law that the Preliminary Breath Test was not an Evidentiary Test as described under the Idaho Code;
- B. Whether the District Court erred in finding as a Matter of Law that Reasonable and Articulate Suspicion was the Legal Standard to Administer the Preliminary Breath Test; and
- C. Whether the District Court erred in finding as a Matter of Law that the preliminary breath test result could be used to form the basis of probable cause to administer further evidentiary testing.

(Appellant's brief, p.8.)

The state rephrases the issue as:

Has Nicolescu failed to show error in the district court's appellate decision reversing the magistrate court's order suppressing evidence and remanding for further proceedings?

ARGUMENT

Nicolescu Has Failed To Show Error In The District Court's Appellate Decision Reversing The Magistrate's Order To Suppress Evidence

A. Introduction

In the magistrate court below, Nicolescu filed a motion to suppress evidence (R., pp.38-48), which was granted by that court (R., pp.73-82). The state appealed to the district court (R., pp.86-87), and the district court reversed (R., pp.162-74). On appeal, Nicolescu argues that the district court erred in its determination. (Appellant's brief, pp.9-30.) Application of the correct legal standards to the facts of this case, however, shows no error by the district court.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2005)). When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Diaz, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

C. Officer Palic Could Require Nicolescu To Submit To A Preliminary Breath Test On Reasonable Suspicion That Nicolescu Was Driving Under The Influence

Below, Nicolescu argued that his Fourth Amendment rights were violated when Officer Palic required him to submit to a preliminary breath test while investigating

whether Nicolescu was driving under the influence of alcohol. (R., pp.38-48.) The Fourth Amendment of the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. While routine traffic stops by police officers implicate the Fourth Amendment’s prohibition against unreasonable searches and seizures, the reasonableness of a traffic stop is analyzed under Terry v. Ohio, 392 U.S. 1 (1968), because a traffic stop is more similar to an investigative detention than a custodial arrest. Delaware v. Prouse, 440 U.S. 648, 653 (1979); State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003). “An investigative detention is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity.” Sheldon, 139 Idaho at 983, 88 P.3d at 1223 (citing Terry, 392 U.S. at 21; United States v. Cortez, 449 U.S. 411, 417 (1981)).

The Court of Appeals has long recognized that “the administration of field sobriety tests following a traffic stop is but an investigative detention.” State v. Ferreira, 133 Idaho 474, 480, 988 P.2d 700, 706 (Ct. App. 1999). “[F]ield sobriety tests may be conducted without consent during an otherwise permissible detention, where they are justified by reason of suspicion of DUI.” State v. Buell, 145 Idaho 54, 56, 175 P.3d 216, 218 (Ct. App. 2008). The reasonableness of the police officer’s suspicion is evaluated based upon the totality of the circumstances at the time of the seizure. Cortez, 449 U.S. at 417–18; State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992).

Preliminary breath tests, conducted in the field for the purpose of confirming or dispelling an officer’s reasonable suspicion that a suspect has been driving under the

influence of alcohol, are directly analogous to other field sobriety tests. See Indiana v. Lucas, 934 N.E.2d 202, 205 (Ind. App. 2012) (“PBTs are akin to general field sobriety tests and provide officers with a simple method for making a threshold determination as to whether a person has consumed alcohol.”). Like other field sobriety tests, a preliminary breath test may be administered where an officer has reasonable suspicion that an individual has been driving under the influence of alcohol. Vermont v. Therrien, 38 A.3d 1129, 1131 (Vt. 2011); Minnesota v. Klamar, 823 N.W.2d 687, 696 (Minn. App. 2012) (citing Hager v. Comm’r of Pub. Safety, 328 N.W.2d 907, 911 (Minn. App. 1986)). See also 75 Pa. Cons. Stat. § 1547(k) (police may require suspect to submit to a preliminary breath test on reasonable suspicion that the suspect is driving while under the influence of alcohol); Kan. Stat. Ann. 2010 Supp. 8-1012(b) (same). The relevant question, therefore, is whether Officer Palic had reasonable suspicion that Nicolescu was driving under the influence of alcohol in order to require him to submit to a preliminary breath test.

It is undisputed in this case that Nicolescu was involved in a vehicular accident at around 2 a.m. when, apparently, another driver ran a red light and collided with him. (R., pp.163-64.) Responding to that accident, Officer Palic detected the strong odor of an alcoholic beverage emanating from Nicolescu. (R., p.163.) Nicolescu admitted that he had consumed alcohol earlier in the evening. (Id.) His eyes were red, bloodshot, and watery, and his legs were shaking and he was unsteady on his feet. (Id.) Officer Palic asked Nicolescu to perform an HGN test. (Id.) After Nicolescu scored 4 of 6 decision points on the HGN, which was already a failing score, Officer Palic decided to terminate the test. (R., pp.163-64.)

Officer Palic terminated the test because, as a result of the accident, Nicolescu's left cornea was scratched and he was clearly shaken up. (Id.) Officer Palic did not require Nicolescu to perform other standard field sobriety tests for the same reason. (Id.) Nicolescu's red, bloodshot, watery eyes and failure on the HGN could have been caused from intoxication, or from his injuries. Likewise, Nicolescu's inability to perform standard field sobriety tests, due to his shaking and unsteady legs, could have been caused from intoxication or from adrenaline due to the accident. Of course, Officer Palic was not required to end his investigation due to the existence of these innocent explanations. See State v. Rader, 135 Idaho 273, 276, 16 P.3d 949, 952 (Ct. App. 2000) ("the existence of alternative innocent explanations of the circumstances does not negate the fact that the officer had a reasonable suspicion that a crime might have been committed"). Rather, under these circumstances, where standard field sobriety tests and the HGN test were inadequate, using the preliminary breath test was the most reasonable, nonintrusive means of confirming or dispelling Officer Palic's reasonable suspicion that Nicolescu was driving under the influence of alcohol.

Under the totality of the circumstances of this case, where Nicolescu smelled of alcohol, admitted he had been drinking, had red, bloodshot, and watery eyes, failed the HGN test, and could not perform other standard field sobriety tests due to his shaking and unsteady legs, Officer Palic had reasonable suspicion to require him to submit to a preliminary breath test. The district court properly reversed the magistrate court's order excluding evidence of Nicolescu's intoxication and should be affirmed.

Nicolescu argues on appeal that the district court erred by finding that the preliminary breath test administered in this case was not an evidentiary test under Idaho

Code § 18-8002(1), asserting, “[f]rom the statutory language, it is clear that an evidentiary test is any breath, urine or blood test used to determine the concentration of alcohol in a person, regardless of the admissibility of the results.”¹ (Appellant’s brief, pp.9-14.) If Nicolescu’s interpretation of Idaho Code § 18-8002(1) is correct, then his entire appeal fails.

Under Idaho Code § 18-8002(1), “any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol” as long as the test “is administered at the request of a peace officer having reasonable grounds to believe that person has been driving” while under the influence. In State v. Diaz, the Idaho Supreme Court determined that the implied consent provision of this statute authorizes an officer to administer such evidentiary tests based on reasonable suspicion that the suspect had been driving while under the influence. 144 Idaho at 302-03, 160 P.3d at 741-42. In that case, the Supreme Court determined “reasonable grounds to suspect that Diaz was driving under the influence” existed due to Diaz’s “erratic driving, bloodshot and glassy eyes, and slurred speech.” Id.

As set forth above, Officer Palic likewise had reasonable grounds to suspect that Nicolescu was driving under the influence in this case: Nicolescu was involved in a vehicular collision at 2:00 a.m.; Officer Palic could smell the strong odor of alcohol on Nicolescu; Nicolescu admitted he had consumed alcohol earlier in the evening; he had

¹ The district court is in fact correct. The requirements for “evidentiary testing” are set forth in Idaho Code § 18-8002A(1)(e). Because the preliminary breath test in this case was not “performed by ... a [method] approved by the Idaho state police,” and standards such as a 15-minute waiting period before administering the test were not observed (R., pp.164; 172 n.2), it would not qualify as an “evidentiary test” under the statute. It does, however, qualify as a properly administered field sobriety test.

red, bloodshot, and watery eyes; Nicolescu had already failed the HGN test before Officer Palic aborted it; and Nicolescu could not perform other standard field sobriety tests due to his shaking and unsteady legs. Taken together, these circumstances are sufficient to support the district court's reasonable suspicion determination. If the preliminary breath test is an evidentiary test as Nicolescu asserts, then it was properly administered under the implied consent provision of Idaho Code § 18-8002(1).

Nicolescu also argues that the district court erred by determining that the results of the preliminary breath test could be considered among other factors to support Officer Palic's reasonable suspicion that Nicolescu was driving under the influence and require him to submit to additional evidentiary testing. (Appellant's brief, pp.24-29.) Assuming, as the district court did, that preliminary breath tests do not constitute evidentiary tests for purposes of Idaho Code § 18-8002(1), a failing score is still good evidence by which an officer would have reasonable grounds to suspect that a driver is under the influence of alcohol. Nicolescu has failed to show any reason that an officer should be prevented from considering the results of a preliminary breath test among other factors under a totality of the circumstances analysis, regardless of that test's admissibility at trial. See State v. Danney, 153 Idaho 405, 408, 283 P.3d 722, 725 (2012) ("[I]t is not necessary that police officers rely only on evidence which will be admissible in court in finding a reasonable suspicion of criminal activity.") (citing State v. Bishop, 146 Idaho 804, 813-14, 203 P.3d 1203, 1212-13 (2009)).

Moreover, even if Officer Palic could not rely on the results of the preliminary breath test in determining whether to administer an evidentiary test that would be admissible at trial, Nicolescu's argument still fails. Reasonable and articulable

suspicion is an objective test which does not depend on an officer's subjective beliefs. Deen v. State, 131 Idaho 435, 436, 958 P.2d 592, 593 (1998). As explained above, under the implied consent provision of Idaho Code § 18-8002(1), when an officer has "reasonable grounds to believe [a] person has been driving" while under the influence of alcohol, he is authorized to administer an evidentiary test of the suspect's blood, breath, or urine. In this case, Officer Palic had "reasonable grounds to believe" that Nicolescu had been driving while intoxicated. With or without the results of the preliminary breath test, Officer Palic was authorized to administer the second evidentiary test based on his objectively reasonable, articulable suspicion.²

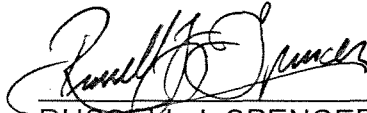
Nicolescu has failed to show any error by the district court. Preliminary breath tests are a type of field sobriety test, administrable under the same standards of reasonable suspicion which govern the administration of all field sobriety tests. Under the totality of the circumstances of this case, Officer Palic had sufficient reasonable suspicion to require Nicolescu to submit to a preliminary breath test. The district court correctly reversed the magistrate court's order excluding evidence of Nicolescu's intoxication and should be affirmed.

² Nicolescu also asserts that probable cause, rather than reasonable suspicion, should be the standard for administering preliminary breath tests. (Appellant's brief, pp.17-24.) His argument fails. First, preliminary breath tests are a type of field sobriety test and, as in all other field sobriety tests, the reasonable suspicion standard applies to their administration. Buell, 145 Idaho at 56, 175 P.3d at 218; Ferreira, 133 Idaho at 480, 988 P.2d at 706. Second, even if preliminary breath tests are evidentiary tests, then the implied consent provision of Idaho Code § 18-8002(1) controls and the preliminary breath test may be administered upon reasonable suspicion that the suspect has been driving while under the influence. Diaz, 144 Idaho at 302-03, 160 P.3d at 741-42; I.C. § 18-8002(1). Either way, reasonable suspicion is the standard.

CONCLUSION

The state respectfully requests that this Court affirm the district court's appellate decision reversing the magistrate's order suppressing evidence and remanding this case for further proceedings.

DATED this 5th day of November, 2013.

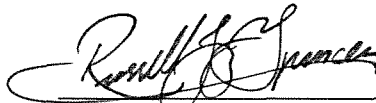


RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of November, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing two copies in the United States mail, postage prepaid, addressed to:

ED GUERRICABEITIA
Davison, Copple, Copple & Copple, LLP
PO Box 1583
Boise, ID 83701



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm